

Chapter 4

BELGIUM

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I ENFORCEMENT POLICIES AND GUIDANCE

Cartels are prohibited by Article IV.1 of the Belgian Code of Economic Law. Book IV of this Code is entitled ‘Protection of competition’ (the Competition Act). The Competition Act entered into force on 6 September 2013, and replaces the previous Act on the Protection of Economic Competition of 15 September 2006. Article IV.1, Section 1 prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices that have as their object or effect the prevention, restriction or distortion of competition, in an appreciable way, within the Belgian market or a substantial part thereof. That prohibition may be declared inapplicable when the conditions mentioned in Article IV.1, Section 3 are satisfied. These Belgian statutory provisions are modelled upon Article 101 of the Treaty on the Functioning of the European Union (TFEU).

Although there is no legal definition of a cartel in Belgium, the notion of cartel is understood to be limited to an agreement or concerted practice between two or more competitors, which non-competitors may also be involved in, aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as fixing or coordinating prices or other trading conditions, the allocation of production or sales quota, the sharing of markets and customers, restrictions of imports or exports, or anticompetitive actions against other competitors.

Belgium is a small country with much cross-border activity. As a consequence, it will occur more often than not that an agreement, decision or concerted practice within the meaning of Article IV.1, Section 1 of the Competition Act may affect trade between Member States within the meaning of Article 101(1) TFEU. In that case, the Belgian Competition

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Authority (BCA) and the Belgian courts also have to apply Article 101 TFEU to such agreement, decision or concerted practice (Article 3 of Regulation (EC) No. 1/2003 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty).

The application of Article 101 TFEU will not lead to a different result than under the application of Article IV.1 of the Competition Act. The latter is construed and applied by the BCA and the Belgian courts in the same way as Article 101 TFEU. European regulations, directives, guidelines and communications are the most important source for the construction and application of Article IV.1.

In addition, block exemptions adopted at the European level under Article 101(3) TFEU are applicable, even if the requirement that trade between Member States may be affected is not met (Article IV.4, Paragraph II of the Competition Act). The government also has the power to adopt block exemptions (Article IV.5 of the Competition Act), but to date it has not used that power.

Apart from the above-mentioned prohibition on cartels addressed to undertakings and associations of undertakings, the Competition Act prohibits physical persons, acting in the name and on behalf of an undertaking or an association of undertakings, to negotiate with competitors or to reach an understanding with them concerning the fixing of prices for the sales of products or services to third parties, the limitation of the production of the sale of products and services, and the allocation of markets (Article IV.1, Section 4 of the Competition Act). This means that not only undertakings or associations of undertakings, but also the physical persons acting for them, can be investigated and prosecuted by the BCA, and be held personally liable and convicted, and that a fine can be imposed on them (albeit a much lower one than the undertaking or association itself – see Sections IV and V, *infra*).

The BCA is responsible for the administrative enforcement of competition law. Investigations and prosecutions are conducted by the body of competition inspectors and prosecutors under the direction of the competition prosecutor general. A competition prosecutor submits a draft decision to the Competition College. Decisions as to whether a cartel exists and which sanctions or remedies are to be imposed are taken by a competition college, which is in each individual case composed of the president of the BCA and two other members, taken from a list of 20 part-time members of the BCA.

The BCA is an autonomous service with legal personality directed by a board, consisting of the president, the competition prosecutor general, the director of economic affairs and the director of legal affairs.

Guidance on cartels and leniency is provided by the following instruments published on the website of the BCA, which is part of the website of the Federal Ministry for the Economy:²

- a New Leniency Guidelines were adopted by the BCA and entered into force on 22 March 2016 (the 2016 Guidelines). A Notice on immunity from fines and reduction of fines in cartel cases, adopted in 2007 by the then Competition Council (the predecessor of the BCA) is still applicable today, in cases where at least one leniency application had already been submitted before the entry into force of the

2 Some of the instruments are published in English under www.economie.fgov.be/en/entreprises/competition/legislation; all of them are published in Dutch under www.economie.fgov.be/nl/ondernemingen/mededinging/wetgeving and in French under www.economie.fgov.be/fr/entreprises/concurrence/legislation.

2016 Guidelines. In a press release dated 6 September 2013, the board of the BCA announced that this Notice would also be applied, analogously, to leniency requests by physical persons.

- b* The BCA has adopted Guidelines on the calculation of fines, which entered into force on 1 November 2014 for cases in which a draft decision had not yet been filed with the Competition College and Guidelines on inspections, which were last adapted on 17 December 2013.
- c* On 27 January 2015, a Notice on informal opinions of the president of the BCA was published. Such opinion can be solicited in cases where a practice has not yet been concluded or implemented, though it is not purely hypothetical that it will be, and when that practice gives rise to a question that is new in competition law practice.

II COOPERATION WITH OTHER JURISDICTIONS

The BCA belongs to the European Competition Network (ECN) of the European Commission and the national competition authorities of the Member States of the European Union. The rules of cooperation within the ECN, laid down in Regulation 1/2003, apply. In addition, there are particularly close contacts at the level of the investigation between the BCA and the competition authorities of neighbouring Member States.

The BCA participates in an informal organisation called the European Competition Authorities, which is a forum where the heads of the competition authorities of the European Economic Area meet annually to exchange experiences and to discuss policy issues. Belgium is also a member of the International Competition Network, a forum of competition authorities from all over the world that meets annually to discuss policy issues and is devoted to preparing best practices in competition law enforcement. Finally, it should be mentioned that Belgium is a member of the Paris-based Organisation for Economic Co-operation and Development (OECD), which has a Competition Committee uniting governmental representatives and competition authorities. The OECD also issues recommendations in the field of competition policy.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

Affirmative defences and exemptions are discussed in Section I, *supra*.

The BCA is unlikely to open an investigation in a case where not at least one, or preferably a significant number, of the cartel members do not have a turnover on, or exported from, Belgian territory. The reasons are two-fold. First, it will not be able to apply Article IV, Section 1 of the Competition Act in the absence of a restriction of competition on the Belgian market or a substantial part thereof. Second, the maximum amount of the fine it can impose is defined with reference to the turnover of the undertaking concerned on, and exported from, Belgian territory, which is likely to be understood as the expression of the intention of the legislator for the BCA to focus on undertakings that are active in Belgium.

IV LENIENCY PROGRAMMES

The present Leniency Guidelines entered into force on 22 March 2016. Both undertakings (this term applies hereafter to both undertakings and associations of undertakings) and physical persons can benefit from a leniency programme. A leniency application by an association of undertakings, however, does not benefit the members of that association.

i Leniency for undertakings

Immunity (of Type 1A) is granted to an undertaking if it is the first to submit information and evidence that will enable the BCA to carry out targeted inspections in connection with the cartel; and at the time of the application, the BCA did not have sufficient evidence to justify an inspection in connection with the cartel.

Immunity (of Type 1B) is available if the undertaking is the first to submit information and evidence that enables the BCA to establish an infringement; and at the time of the submission of the leniency application, the BCA did not have sufficient evidence to find an infringement in connection with the cartel.

Immunity cannot be obtained by applicants who took steps to coerce another undertaking to participate in the cartel.

An undertaking may obtain a reduction of fines (Type 2) of between 30 and 50 per cent if it is the first to submit evidence with significant added value; between 20 and 40 per cent if it is the second to do so; and between 10 and 30 per cent if it is the third or subsequent to do so. Under the 2007 Notice on Leniency there were only two categories: a reduction of fines of 30 to 50 per cent for the first applicant and of 10 to 30 per cent for the following applicants. The concept of 'significant added value' refers to the extent to which the evidence provided strengthens the BCA's ability to prove the cartel.

The general conditions for leniency are:

- a* preceding the application, not to destroy, falsify or conceal any evidence in relation to the cartel, and to keep secret the intention to submit a leniency application and its content, except to other competition authorities;
- b* to end its involvement in the cartel immediately following the application, unless the competition prosecutor finds its continued involvement to be reasonably necessary to preserve the integrity of its inspections; and
- c* to cooperate fully, genuinely, promptly and continuously with the BCA. This means, for instance, that the BCA will have to be provided with all relevant information and evidence the applicant has access to; that he or she must not dispute any factual elements he or she has provided in connection with the investigation and on which the leniency declaration is based, or dispute the materiality of the facts he or she has mentioned or the infringement itself; that he or she may be called upon to reply to any request that may contribute to the establishment of relevant facts; that he or she has to make current and, if possible, former directors and employees appear before the BCA; that he or she does not destroy, falsify or conceal information or evidence; and that he or she does not disclose the leniency application or its content until the draft decision of the competition prosecutor is submitted to the Competition College, unless agreed otherwise with the competition prosecutor.

Undertakings wishing to obtain immunity or a reduction of fines have to submit a full leniency application comprising a written leniency statement and evidence. The written statement must contain the following information:

- a* the name and address of the legal person filing the application;
- b* the names and functions of the physical persons involved in the cartel with the applicant;
- c* the names and addresses of undertakings that were involved in the cartel and the names and addresses of other physical persons involved in the cartel;
- d* a detailed description of the cartel including the purpose, activities, products and services concerned, the territories concerned, its duration and the estimated market volume;
- e* information on where, when and with whom the cartel meetings were held and what was discussed at these meetings;
- f* the nature of the alleged cartel behaviour;
- g* all relevant information accompanying the evidence; and
- h* information on the leniency applications filed or possibly to be filed with other competition authorities in and outside of the European Union in connection with the cartel.

Before filing a formal request for leniency, the would-be applicant can contact the competition prosecutor general, either himself or herself or through the intermediary of an attorney, even anonymously, in order to obtain information in connection with leniency. The competition prosecutor general will provide the requested information as soon as possible.

Only the would-be applicant's attorney (not the applicant) can contact the competition prosecutor general by telephone in order to find out whether the possibility to obtain full immunity is still available. If that is the case, the attorney is required to file the leniency application immediately. This implies that his or her client has given him or her a mandate to file for leniency before he or she makes the phone call. Before answering that question, the competition prosecutor general will ask the attorney to confirm by email that he or she has received the instruction of his or her client to file a request for immunity or a marker, in case the answer to the question of whether it is possible to obtain full immunity is positive.

Before filing a leniency request, the applicant or his or her representative has to make an appointment with the competition prosecutor general, by telephone or by email. When the applicant requests an appointment by telephone, the prosecutor general will make notice of the day and time of the request. In order to obtain the appointment, he or she has to provide the following information: his or her name and address; the products and territories concerned; the identity of the participants to the cartel; and the nature and the estimated duration of the cartel.

If the appointment is requested during an inspection, it will take place after the inspection has been closed.

The application will be considered to have been filed when the appointment with the competition prosecutor general takes place. In case of multiple requests for an appointment, the competition prosecutor general will schedule the appointments in the same chronological order as he or she received the requests.

In order to remedy information asymmetries, the college of competition prosecutors will issue a press release after the inspections, without mentioning names of undertakings and

without violating the presumption of innocence, as well as after an investigation has been discontinued. This will enable other undertakings or physical persons to decide whether or not to apply for leniency.

The leniency statement may be drafted in one of the official languages of Belgium (Dutch, French or German) or in English. In the latter case, the translation in one of the official languages of Belgium must be submitted within two working days, unless otherwise agreed with the competition prosecutor general. If the evidence is not submitted in one of the official languages of Belgium, the competition prosecutor general may request a translation.

The leniency statement can be made orally, in which case a transcription is made by the registry of the BCA. Oral leniency statements will always be accepted in cases where the European Commission is extremely well placed to handle the case within the meaning of the ECN Notice on cooperation between authorities, and the undertaking files a summary leniency application with the BCA.

The content of the summary application must be identical to the leniency application that is filed with the European Commission, and include: the name and address of the applicant, the other participants to the cartel, the relevant products and territories concerned, the estimated duration of the cartel, the nature of the cartel, the Member States where the evidence is likely to be found and all other leniency applications that have been or will be filed with competition authorities inside or outside of the EU.

A summary application will lead to a marker. When an applicant discloses information and evidence to the European Commission afterwards that implies that the cartel is of a different scale to what was mentioned in the summary application, he or she must inform the competition prosecutor general. By doing so, the protection will remain identical at the level of the European Commission and of the BCA.

The Leniency Guidelines provide for a marker system. A potential applicant may initially request, by email or telephone, for a marker in order to protect his or her place in the queue for a period of time such as to allow for the gathering of the necessary information and evidence to meet the threshold for immunity or reduction of fines.

To secure the marker, the applicant must, from the outset, provide a justification for applying for the marker only, as well as:

- a* his or her name and address;
- b* the parties to the alleged cartel;
- c* the affected product or products and territory or territories;
- d* the estimated duration of the alleged cartel; and
- e* the nature of the alleged cartel conduct.

The competition prosecutor general, or, in his or her absence, a competition prosecutor designated by him or her to that effect, decides whether the marker is granted or not, taking into consideration the credibility and the seriousness of the justification provided by the applicant. The marker has to be perfected within the period determined by the competition prosecutor by submitting the information required to be eligible for immunity from fines. Failing to do so, the marker is lost, and a full or summary leniency application has to be submitted in order to be eligible for any immunity from or reduction of fines.

On the basis of the investigation of the leniency application, the competition prosecutor general requests the Competition College to adopt a leniency declaration. The

College will do so, if it recognises that the conditions to obtain leniency are met, and that immunity or reduction of fines will be granted, if the applicant continues to comply with all conditions for leniency throughout the procedure.

In case the Competition College decides that the applicant does not meet the conditions for full immunity, the applicant will automatically be considered for a reduction of fines. If the College also decides that the applicant does not meet the conditions for reduction of fines, the leniency application is dismissed. In that case, the BCA will not use the information it has obtained by means of the leniency application submitted in good faith against the applicant. Yet, the competition prosecutor can still request or obtain the same information making use of its ordinary investigative powers.

If the applicant does not continue to comply with all the conditions for leniency throughout the procedure, he or she will lose the immunity or reduction of fines. In that case, the BCA is entitled to use all the information received from the applicant as proof and impose a fine as if the leniency application was never submitted.

Immunity from or reduction of fines is eventually granted in the decision of the Competition College on the cartel as such, or in the settlement decision of the college of competition prosecutors. Access to leniency statements is restricted to the recipients of the statement of objections in the cartel procedure. They must sign a written statement that they will not copy the leniency statements or transcripts thereof and that they will solely use the information for purposes of the procedure concerned.

ii Immunity from prosecution for physical persons

Even though the Competition Act itself is not explicit on this point, the BCA has announced in the 2016 Guidelines that a physical person will only be subject to investigation and conviction for the infringements mentioned in Article IV.1, Section 4 of the Competition Act, if the undertaking on behalf of which the physical person was acting is itself investigated and convicted.

Immunity can be granted to physical persons who have committed the infringements mentioned in Article IV.1, Section 4 of the Competition Act, while acting on behalf of an undertaking.

In order to obtain immunity a physical person must have been involved in one or multiple infringements mentioned in Article IV.1, Section 4 of the Competition Act, and have contributed to prove the existence of these illegal practices by either providing information to the BCA it did not have yet or by recognising an illegal practice mentioned under Article IV.1, Section 4.

All immunity applicants who are physical persons can obtain full immunity, regardless of the rank of their application.

The fact that the physical person has already provided the information that would entitle the undertaking to immunity or reduction of fines does not preclude the undertaking itself from obtaining immunity or reduction of fines, and this is regardless of whether the physical person applying for immunity is or was connected to the undertaking applying for immunity.

Physical persons can apply for immunity by participating in the leniency application of the undertaking, or independently of the undertaking. In the former case, his or her immunity application can either be inserted in the leniency application of the undertaking, or filed separately but simultaneously. In the latter case, he or she must provide the following information: his or her name and address; the products and territories concerned; the identity

of the participants to the cartel; the nature and the estimated duration of the cartel; and his or her role in the cartel. Immunity can be obtained even when the undertaking does not file for leniency.

V PENALTIES

i Undertakings

The BCA may impose fines on undertakings for infringement of the cartel prohibition in Article IV.1, Section 1 of the Competition Act or Article 101(1) TFEU not exceeding 10 per cent of their turnover. In addition, the BCA may, by the same decision, impose periodic penalty payments for non-compliance with its decision of up to 5 per cent of the average daily turnover, per day of non-compliance, with effect from the date fixed in its decision. The turnover is the one realised during the previous financial year on, and exported from, Belgian territory.

The Fining Guidelines of the BCA are modelled upon those of the European Commission (published in the Official Journal 2006/C 210/02) with the following diverging rules. The value of sales that is taken into account to calculate the basic amount of the fine (which in turn is a proportion of the value of sales, depending on the degree of gravity of the infringement, multiplied by the number of years of infringement) is the value of the undertaking's sales of goods or services in Belgium to which the infringement directly or indirectly relates.

If the undertaking has a turnover in Belgium, but no sales of goods or services in Belgium to which the infringement directly or indirectly relates, the following value of sales to which the infringement directly or indirectly relates is taken into account in order to calculate the basic amount of the fine:

- a* in cases where the infringement consists of a division of the markets, whereby one or more undertakings have agreed not to sell in Belgium: the value of the sales in the geographical markets where they did offer their products and services; and
- b* in all other cases: the average value of the sales in Belgium by the other participants in the infringement who did offer products and services in Belgium.

At any time during the investigation, but before the competition prosecutor submits the draft decision to the Competition College, the College of competition prosecutors can reach a settlement with an undertaking willing to accept that the infringement has been committed in return for a 10 per cent reduction of the fine calculated according to the Guidelines.

ii Personal fines

The fines imposed on physical persons can range between €100 and €10,000. No fining guidelines exist, nor do any decisions by the BCA. However, footnote 1 of the above-mentioned Fining Guidelines for undertakings mentions that the degree of gravity of the infringement, the implication of the physical person in the infringement and other circumstances of the case will be taken into consideration when setting a fine.

VI 'DAY ONE' RESPONSE

i Dawn raids

Competition prosecutors and inspectors of the BCA have the power to search for infringements and to collect all information to that effect. They are entitled to carry out inspections (dawn raids) between 8am and 6pm if they are instructed to do so by an order signed by a competition prosecutor that mentions the object and the purpose of the inspection, and with the prior authorisation of a judge of the court of first instance of the judiciary that has ordinary jurisdiction to the effect of authorising dawn raids in criminal matters. The inspectors can be accompanied by experts. The inspection can be conducted on the premises, means of transportation and other places of the undertakings, as well as at the home of heads of undertakings, directors, managers and other members of staff, and at the home address or the business premises of natural or legal persons (internal or external) entrusted with commercial, accounting, administrative, fiscal or financial management responsibilities, subject to the condition that the inspectors have reason to believe that they will find information at these locations that it is necessary to gather for the accomplishment of their mission as defined in the order of the competition prosecutor.

During the dawn raid, the undertaking can be assisted by one or more attorneys or other counsel. It is advisable to have one attorney present per inspector so that the whereabouts of the latter and his or her investigations can be monitored closely. Inspectors are not required to await the arrival of the attorney.

The inspectors are authorised to make copies of documents and to seize them by affixing seals in order to ascertain that they will not be removed for the duration of the inspection. The seizure cannot be maintained for more than 72 hours in premises other than those of the undertakings.

Correspondence with external counsel as well as with in-house counsel that are members of the Belgian Institute of In-house Counsel benefits from legal professional privilege (LPP) under Belgian law.

The BCA's Guidelines for inspections outline certain rules for searches conducted in a paper-based and in a digital environment. Paper documents are selected manually and copied. Digital documents may be searched using built-in (keyword) search tools, or the BCA's own dedicated software or hardware (forensic IT tools), and data copied on separate storage media.

If needs be, the data so selected are divided into three categories, and kept or stored accordingly:

- a* documents that the undertaking does not contest are within the scope of the inspection as defined in the order of the competition prosecutor, and for which it does not claim LPP;
- b* documents that the undertaking claims LPP for, but the inspectors do not agree; and
- c* documents that are outwith the scope of the inspection as defined by the order of the competition prosecutor according to the undertaking, but within that scope according to the inspector.

The documents of category (a) are immediately available for further investigation. For the documents in categories (b) and (c), the undertaking has to justify the LPP or the out-of-scope character within at the latest 10 working days from a date as determined by the competition prosecutor. Another competition prosecutor will decide whether LPP protection is available.

If so, the document is removed from the file of the investigation. The competition prosecutor in charge of the case will decide whether the documents are actually in or out of the scope of the investigation. In the latter case, they are removed from the file of the investigation.

Any decision by a competition prosecutor concerning the use of data in an investigation obtained by an inspection can be appealed before the Brussels Court of Appeal after the communication of the statement of objections and to the extent that these data have been used as a basis for these objections.

ii Requests for information

During an investigation procedure, the competition prosecutors may send information requests to undertakings with a set time limit to provide a response. If an undertaking does not provide the information within the time limit set by the competition prosecutors, or if the information supplied is incomplete, inaccurate or misrepresented, the competition prosecutors may request the information by reasoned decision. This decision will specify the information required and set a deadline for providing the said information.

iii Sanctions

The Competition College may impose on persons, undertakings or associations of undertakings involved fines of up to 1 per cent of their turnover in Belgium in the previous financial year if they prevent or impede the investigations, or if the information requested by a reasoned decision is incomplete, inaccurate or misleading or is not provided within the deadline.

VII PRIVATE ENFORCEMENT

i Voiding of agreements and decisions

Agreements by undertakings and decisions of associations of undertakings prohibited pursuant to Article IV.1 of the Belgian Competition Act are – as are agreements and decisions prohibited pursuant to Article 101 TFEU – automatically void.

ii Actions for damages: substantive law

Actions for damages to compensate harm suffered as a result of an infringement of competition law are governed by Belgian law on civil liability.

When implementing Directive 2014/104 on actions for damages for infringement of competition law (which is expected for mid-2017), Belgian law will not have to be adapted significantly. Most rules the Directive imposes are already on the Belgian law books. The most important modification is the rebuttable presumption that cartels cause harm. The present rule that the claimant has to demonstrate that the infringement has caused harm has proven to be an obstacle for damages claims to be effective in some of the cases of private enforcement that have already been brought before the Belgian courts.

iii Actions for damages: procedural law

Several individual legal actions brought by different plaintiffs arising from the same or similar events or contracts can be brought jointly before the court, in which case they will be examined in the same proceedings and decided upon in the same judgment. However, they remain separate actions.

An action for collective redress has been introduced into Belgian law for acts causing harm that have occurred after 1 September 2014. However, it is only open to non-profit organisations or public bodies representing consumers.

VIII CURRENT DEVELOPMENTS

From 2017 onwards, cartels are increasingly likely to become a priority for the BCA. Merger control will remain very time-consuming and human resources at the BCA are extremely limited. The new BCA has already established its reputation in fining cartels. On 22 June 2015, the College of competition prosecutors rendered its first settlement decision. A substantial number of large retailers of healthcare and beauty products and some of their suppliers, the latter having been instrumental in enabling the former to simultaneously raise prices, were fined a total amount of €174 million, the largest fine ever imposed in a single case. Subsequently, more settlement decisions have been rendered or are under way.